

**BEFORE THE  
PUBLIC SERVICE COMMISSION OF  
SOUTH CAROLINA**

**DOCKET NO. 2022-188-EC**

SPECTRUM SOUTHEAST, LLC,	)	
	)	
Complainant,	)	<b>MOTION TO STRIKE PORTIONS</b>
	)	<b>OF PETITION TO INTERVENE AND</b>
v.	)	<b>ANSWER OF YORK ELECTRIC</b>
	)	<b>COOPERATIVE, INC. AND THE</b>
YORK ELECTRIC COOPERATIVE, INC.,	)	<b>ELECTRIC COOPERATIVES OF</b>
	)	<b>SOUTH CAROLINA, INC. TO</b>
Respondent.	)	<b>SPECTRUM SOUTHEAST</b>
	)	<b>PETITION</b>

Pursuant to 10 S.C. Code Ann. Regs. 103-829 and Rule 12(f) of the South Carolina Rules of Civil Procedure (“SCRCP”), Complainant Spectrum Southeast, LLC (“Charter”) hereby moves the Public Service Commission of South Carolina (“Commission”) to strike those portions of the Petition to Intervene and Answer of York Electric Cooperative, Inc.’s (“York”) and Electric Cooperatives of South Carolina, Inc.’s (“ECSC”) (collectively, “Co-ops”) to Charter’s Petition ( “Answer”) that are immaterial and impertinent to, and inappropriately seek to exceed the Commission’s statutory jurisdiction to resolve, the single legal issue actually presented for determination in this proceeding by Charter’s Petition to Determine Just and Reasonable Terms and Conditions for Pole Attachment Pursuant to S.C. Code Ann. 58-9-3030 (“Charter’s Petition”).

## LEGAL STANDARD

South Carolina courts court may strike from “any pleading any insufficient defense or any redundant, *immaterial, impertinent* or scandalous matter.” SCRCP 12(f)<sup>1</sup> (emphasis added).

<sup>1</sup> The Commission routinely looks to the South Carolina Rules of Civil Procedure (“SCRCPP”) where the matter is not covered by the Commission’s regulations. *See* 10 S.C. Code Ann. Regs. 103-835.

In construing the South Carolina Rules of Civil Procedure, including motions to strike, South Carolina courts look “for guidance to cases interpreting the federal rules.” *Maybank v. BB&T Corp.*, 565, 787 S.E.2d 498, 510 (S.C. 2016). Like Rule 12(f) of the SCRPC, Rule 12(f) of the Federal Rules of Civil Procedure also permits courts to “strike from any pleading any . . . immaterial [or] impertinent . . . matter.” Fed. R. Civ. P. 12(f); *see also* 61A Am. Jur. 2d *Pleading* § 411 (“ ‘Immaterial’ matter, in this context, is matter . . . that is outside the scope of the action . . . [while] ‘[i]mpertinent’ matter, for purposes of Rule 12(f), consists of any allegation not responsive or relevant to the issues involved in the action.”). “The purpose of the motion to strike is to avoid the waste of time and money that arises from litigating unnecessary issues.” *J&J Sports Prods., Inc. v. Lawson*, No. 3:17-CV-02939-JMC, 2019 WL 1754744, at \*2 (D.S.C. Apr. 19, 2019) (internal quotations omitted). That is precisely why Charter brings this Motion.

“The PSC is a government agency of *limited power and jurisdiction*, which is conferred either expressly or impliedly by the General Assembly.” *Kiawah Prop. Owners Grp. v. Pub. Serv. Comm’n of S.C.*, 597 S.E.2d 145, 147 (S.C. 2004) (emphasis added). And as relevant here, Section 58-9-3030(A) of the South Carolina Broadband Accessibility Act (“BAA”) expressly limits the Commission’s jurisdiction to resolve disputes over pole attachment rates, terms, and conditions. After a communications service provider and electric cooperative have negotiated in good faith for the requisite period, “either party may petition the commission to determine just and reasonable rates, terms, and conditions for the agreements.” S.C. Code Ann. § 58-3030(A)(2). The Commission then “must make *such determination* within [180] days of the filing of the petition *for that determination*.” *Id.* (emphasis added). In other words, the Commission only has jurisdiction over the specific issues raised in “that” determination sought

in the petition. *See id.*; *Kiawah Prop. Owners Grp.*, 597 S.E.2d at 147. The Commission does not have a roving commission generally to assess a party’s overall reasonableness.

### LAW/ANALYSIS

The Commission should strike specific portions of the Co-ops’ Answer as described below both because they are immaterial and impertinent to the sole legal question presented by Charter’s Petition, but also because, under the BAA, the Commission does not have jurisdiction to entertain them in this proceeding. *See* SCR 12(f); S.C. Code Ann. § 58-9-3030(A)(2). With its Petition, Charter raised one, “limited . . . legal question” under the BAA: “whether an electric cooperative pole owner may deny access to its poles based on construction requirements that exceed those of the National Electrical Safety Code (‘NESC’).” Charter’s Pet. ¶ 1.<sup>2</sup> Charter believes the answer to this purely legal issue – presented only as a request for declaratory relief – is “no,” based on the express language of the BAA and the General Assembly’s clear intent.

While the Co-ops agree that Charter’s Petition raises this “specific legal issue” for determination by the Commission, with their Answer, the Co-ops nevertheless seek impermissibly to vastly widen the scope of this proceeding far beyond the issue Charter has presented to generally consider York’s overall reasonableness. Answer ¶ 1 (seeking scheduling order to examine “whether York met its obligations under the [BAA] to offer [Charter] access to its poles under ‘... just, reasonable, and nondiscriminatory rates, fees charges, terms and conditions’”) Indeed, instead of offering any response rooted in statutory interpretation or examination of the relevant BAA text, the Co-ops instead devote the bulk of their Answer to citing materials outside the BAA for the proposition that the NESC is a “minimum” standard,

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<sup>2</sup> *See also* Charter’s Pet. ¶ 11 (“A clear determination from the Commission *on this legal point* will resolve this dispute.” (emphasis added)); *id.* ¶ 45 (seeking a declaratory ruling on “this discrete issue”); *id.* ¶ 46(1) (requesting the Commission “[c]onfirm that the BAA prohibits electric cooperatives from denying pole access based on construction standards that exceed the NESC”).

and asserting that they “will show” that York acted reasonably and that its excessive clearance requirements are necessary. *Id.* ¶¶ 3 & 9-12. But whether or not York acted reasonably or the intent or history of its clearance requirements (which predated the BAA in any event) have no bearing on the *purely legal* declaratory ruling Charter seeks from the Commission: to “[c]onfirm that the BAA prohibits electric cooperatives from denying pole access based on construction standards that exceed the NESC.” Charter’s Pet. ¶ 46. A fact-intensive inquiry into the “reasonableness” of York’s actions – as the Co-ops apparently desire – would greatly expand this proceeding (and the time, expense, and burden required to resolve it) to consider matters that are fundamentally immaterial and impertinent to the legal issue presented for determination.

Therefore, those portions of the Answer that attempt to recast the issue for determination in this proceeding as something other than that set forth in Charter’s Petition are appropriately struck. *See* SCRP 12(f); *Carlson v. Gen. Motors Corp.*, No. CIV. A. 2-86-2674-1, 1991 WL 90893, at \*1 (D.S.C. Mar. 14, 1991) (noting the court has an “obvious power to strike from pleadings any matter not having much value in developing the issues of the case”).

While it would be inappropriate to expand the proceeding to consider issues outside the one that Charter actually raised, the Commission does not properly have jurisdiction to entertain the Co-op’s desired sweeping inquiry either because the BAA itself limits the Commission to making a determination on the issues set forth in a petition filed pursuant to Section 58-9-3030(A). More specifically, the BAA provides that the Commission must make a “determination” on a petition “within [180] days of the filing of the petition for *that* determination.” S.C. Code Ann. § 58-9-3030(A)(2) (emphasis added). Thus, the Commission only has jurisdiction to resolve the specific issues that are presented in a petition—*i.e.* “*that*” determination raised in the petition. And here, the *only* “determination” properly before the

Commission is the single, specific legal issue raised in Charter's Petition – nothing more. The Commission therefore cannot properly evaluate any other issues, including those raised as arguments in an answer. *See Kiawah Prop. Owners Grp.*, 597 S.E.2d at 147; S.C. Code Ann. § 58-9-3030(A)(2).<sup>3</sup>

Accordingly, Charter respectfully requests the Commission to strike the following paragraphs or portions thereof in the Co-op's Answer:

1. ... In its Petition to Determine Just and Reasonable Terms and Conditions ("Petition") Charter seeks a determination from the Commission on a specific legal issue. The ruling that Charter seeks is inconsistent with the Act and should be denied. ~~Instead, the Commission should issue a scheduling order providing for pre-filing of testimony and an evidentiary hearing on whether York has met its obligations under the Act to offer Charter access to its poles under "...just, reasonable, and nondiscriminatory rates, fees, charges, terms and conditions..." S.C. Code Ann. §58-9-3030(A).~~ The Act requires the Commission to rule on the Petition within 180 days from the date it was filed. *See* S.C. Code Ann. §58-9-3030(A)(2). ~~York and ECSC are prepared to submit testimony and participate in an evidentiary hearing on a schedule that will allow the Commission time to meet the statutory deadline.~~

...

3. ... The Commission should reject Charter's proposed reading of the Act ~~and issue a scheduling order to provide for an evidentiary hearing on whether York has met its obligations to provide access to its poles on reasonable and nondiscriminatory terms.~~

...

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WHEREFORE, York and ECSC request the following:

(1) permit York and ECSC to intervene as parties in this proceeding;

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<sup>3</sup> The relief sought in their Answer is to (1) "permit York and ESCS to intervene as parties in this proceeding" and (2) "issue a scheduling order providing for an evidentiary hearing to determine whether York met its obligation under the Act to offer access to its poles on reasonable and non-discriminatory terms and conditions." Answer at 7.

~~(2) issue a scheduling order providing for an evidentiary hearing to determine whether York met its obligation under the Act to offer access to its poles on reasonable and non-discriminatory terms and conditions.~~

The language Charter seeks to strike from Paragraphs 1, 3, and 13 of the Co-op's Answer attempts to impermissibly recast the single specific legal issue properly before this Commission on Charter's Petition into something far broader. Charter's Petition only requests the Commission to affirm that – as a pure matter of law and statutory interpretation – the express language of the BAA prevents pole owners, like York, from denying attachment rights where attachers, like Charter, seek access in compliance with the NESC. But “whether York has met its obligations under the Act” is only relevant in this proceeding once the Commission determines the single legal issue presented by Charter's Petition. That is, if the Commission agrees that the BAA does *not* permit pole owners to impose clearance standards that exceed the NESC, then it is indisputable that York's proposed agreement would *not* meet the obligations of the BAA on this issue.

Nor is there any need for this Commission to permit broad discovery and preside over a full-blown evidentiary proceeding given Charter's Petition only raises a legal issue of statutory interpretation. *See Aiken v. S.C. Dep't of Revenue*, 839 S.E.2d 96, 99 (S.C. 2020) (“What the General Assembly says in the text of the statute is the best evidence of its intent.”); *Grier v. AMISUB of S.C., Inc.*, 725 S.E.2d 693, 695 (S.C. 2012) (same). Legal memoranda and arguments of counsel, and perhaps limited pre-filed testimony, should be sufficient to inform the Commission's determination. *See Catawba Indian Tribe of S.C. v. State*, 642 S.E.2d 751, 753 (S.C. 2007) (“The issue of interpretation of a statute is a question of law for the court”). The Commission should therefore streamline and revise its proposed schedule.

~~9. York and ECSC will show that York negotiated in good faith and repeatedly offered Charter reasonable and non-discriminatory terms and conditions as required by the Act.~~

Whether York generally “negotiated in good faith” is immaterial and impertinent to the single specific legal issue raised in Charter’s Petition and outside the scope of the Commission’s jurisdiction here. The “reasonableness” of York’s terms and conditions is indeed only relevant to the extent that York’s imposition of construction standards that exceed the NESC violate the BAA or not.

~~11. York and ECSC will show that York’s clearance requirements are reasonable and non-discriminatory and have been included in all York pole attachment agreements since 2008; that all seven of York’s current pole attachment agreements with communications service providers require the same clearances that Charter finds objectionable.~~

Whether York believes its clearance requirements are “reasonable and non-discriminatory,” whether they have existed since 2008, and whether they are included in other pole attachment agreements is immaterial and impertinent to the specific legal issue for which Charter has sought a determination and beyond the Commission’s jurisdiction in this proceeding.

~~12. York and ECSC will show that York’s decision to require clearances different from the minimum clearances found in the NESC was based on years of experience with attachments to its poles not being properly maintained by communications service providers and those communications service providers being unresponsive to York efforts to require proper maintenance. York and ECSC will further show that the York clearance requirements were intended by York to protect the integrity and reliability of its electricity distribution system and the clearance requirements have been successful in achieving that result.~~

York’s assertions that it imposes standards in excess of the NESC because of past shortcomings on the part of attaching communications service providers and its belief that attachment standards in excess of the NESC are necessary are similarly immaterial and impertinent to the specific legal issue before the Commission for determination in this proceeding. Simply put, these matters are not related or responsive to whether the express

language of the BAA prohibits electric cooperatives from denying pole access based on construction standards that exceed the NESC.

### CONCLUSION

Given that the express statutory language of the BAA prevents electric cooperatives from denying attachment rights to communications service providers where they seek access to poles in compliance with the NESC, it is not surprising that the Co-ops would prefer to avoid an examination of the relevant text by recasting the determination sought under Charter's Petition into something far broader and more nebulous. However, the Co-ops are not at liberty to use their Answer to effectively re-write the single, specific legal issue Charter presented in its Petition for the Commission's determination. And the Commission does not have jurisdiction in this proceeding to entertain these extraneous matters in any event.

WHEREFORE, Charter respectfully requests that this Commission:

- (A) Grant this Motion to Strike those certain portions of the Co-op's Answer as set forth above;
- (B) Affirm that Charter's Petition raises a single specific legal issue for determination by the Commission in this proceeding (*i.e.*, whether "the BAA prohibits electric cooperatives from denying pole access based on construction standards that exceed the NESC" (Charter's Pet. ¶ 46(1)); and
- (C) Grant any such other relief as the Commission deems just and proper.

[SIGNATURE PAGE FOLLOWS]



Respectfully submitted this 8th day of June 2022.

s/Andrew J. D'Antoni  
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*\*Pro hac vice* admission pending

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